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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1073

FIRST NATIONAL BANK OF OREGON,
a national banking association,

Petitioner,

v.

AMERICAN TIMBER & TRADING CO., an Oregon corporation, LAWRENCE BERNARD, individually and DR. LAWRENCE BERNARD, Professional Corporation, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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April 4, 1975

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REASONS FOR FILING REPLY BRIEF

Petitioner is aware of the rule of this court which permits the filing of a reply brief addressed to arguments first

raised in the brief in opposition. However, petitioner believes that a reply brief should be filed and considered in this case for the following two reasons:

A. The court should invoke the doctrine of abstention and remand the case to the Court of Appeals with directions that the action be stayed pending a determination by the Oregon Supreme Court of any issues involving Oregon substantive law.

B. Contrary to the arguments of respondents in their brief, there is an overriding question of national significance involving the interpretation of federal law in this case.

A. The Court of Appeals should not have Vacated the Order Granting a Stay

Petitioner moved the Court of Appeals to abstain from proceeding further with this action pending determination of two actions instituted in the Circuit Court of

the State of Oregon. In support of that motion petitioner filed an affidavit stating that, while this action was pending, one of the respondents filed in the Multnomah County Circuit Court of the State of Oregon an action entitled Lawrence Bernard, an individual and Dr. Lawrence Bernard, PC, a corporation, plaintiffs, v. First National Bank of Oregon, a national banking association, defendant, Clerk's No. 397-001 ("Oregon action").

In the Oregon action, Bernard alleged that Bank, the petitioner herein, improperly used a 360 day year in computing interest on certain loans to various customers. In the Oregon action, Bernard was again represented by the same attorneys as here. The loan agreements which were the subject of the Oregon action are the same loan agreements as are involved in the instant case.

The Court of Appeals on April 10, 1974, filed an order stating:

> "The petition for rehearing is granted. The court is of the opinion that we should wait a reasonable time to see if the issues are resolved in the Oregon state courts.
>
> "The petition for rehearing will be deemed submitted for decision six months after the date of filing of this order."

On December 2, 1974, the Court of Appeals vacated its order for a stay of further proceedings.

The Court of Appeals should not have vacated the order for stay. If issues in the instant case are controlled by state law, the Court of Appeals should await the determination by the state court of such issues.

The Court of Appeals in its opinion affirming summary judgment in this case held that construction of the words

"per annum" as contained in the Oregon interest statutes is a matter of state law. The Court of Appeals also held that it would defer to the trial court on that question as the trial court presumably had more expertise in matters of Oregon law.

The construction of the words "per annum" in the Oregon interest statutes presented a novel question.

Special circumstances warranting the application of the abstention doctrine exist in this case.

1. The issue is a novel one insofar as the state of Oregon is concerned.

2. The issue is one of vital concern to the state of Oregon and to the United States.

3. The question will ultimately have to be resolved by an Oregon court.

4. Such resolution will be forthcoming soon because of the two pending actions.

5. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other persons in the state of Oregon.

> Kaiser Steel Corporation v. W. S. Ranch Company, 391 US 593, 20 L Ed2d 835 (1968)

B. This Case Presents a Question of National Significance Involving the Interpretation of Federal Law.

In their brief in opposition, respondents assert (pp. 4-5) that significant issues of federal law are not involved, notwithstanding that this case is brought under 12 USC, § 86, for the penalty for a "knowing" violation of a federal statute. Instead, respondents contend the issues are entirely controlled by state law.

Respondents' argument is not correct. The writ of certiorari is not sought to correct an aberrant decision as to local law.

The basic issue is whether it is necessary under 12 USC, § 86, to show an intentionally wrongful act by a national bank in order to constitute a violation of the statute. In other words, is 12 USC, § 86, to be interpreted as a liability without fault statute, despite language that the purported violation must have been "knowingly done"?

Prior decisions of this court, and of Courts of Appeal other than the Ninth Circuit, are to the effect that the words "knowingly done," in the context of the National Bank Act, mean more than mere knowledge of the facts. Instead a showing of an intentional and designed exaction of excessive interest has been required. This court and other courts have held that intent must be examined in light of existing custom and commercial practice, and should not be

determined upon the basis of contradictory assertions as to the facts on a motion for summary judgment.

The question of requisite showing of bad motive or scienter under 12 USC, § 86, must be considered a question of federal law, as interpretation of a federal statute is involved, and the same standard should be applied throughout the country. In these times of high interest rates, every national bank in the country has a vital interest in the proper resolution of the question. This is particularly so in light of the risk of being assessed substantial penalties (double the entire interest paid) in class action litigation, even though no design to violate the law is present and the potential violation cannot be reasonably anticipated.

CONCLUSION

As the controlling issues in the instant litigation and in the now pending litigation in the state court are the same, the parties and attorneys are the same, and respondents have provided a convenient vehicle for deciding the issue by their own action, this court should reinstate the order for stay if the issues in this case are issues of state law.

If the issues are controlled by federal law, then the writ of certiorari should be granted as the courts below have clearly held that all issues are controlled by state law.

Respectfully submitted,

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